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IN THE

Supreme Court of the United States

October Term, 1948.

No. 298.

DEFENSE SUPPLIES CORPORATION,

Petitioner,

vs.

LAWRENCE WAREHOUSE CO. and CAPITOL CHEVROLET CO.,

Respondents.

PETITION FOR RE-HEARING.

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DEFENSE SUPPLIES CORPORATION,

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vs.

LAWRENCE WAREHOUSE CO. and CAPITOL CHEVROLET CO.,

Respondents.

PETITION FOR RE-HEARING.

Your petitioners, Lawrence Warehouse Co., and Capitol Chevrolet Co., respectfully petition for a re-hearing in this Honorable Court upon the following grounds, to-wit:

I.

The decision of the court is based upon a ground not specified nor argued in the petitions or briefs on *certiorari*.

II.

The court erred in its statement of the applicable law in the case. The decision is contrary to the Act of Congress, and has added provisos to the Act of Congress where none were present by which it puts "life into a dead corporation" for litigation purposes, and gives a remedy of suit on a judgment never authorized by Congress.

III.

The court erred in its statement of the facts in the case. The decision is contrary to the facts.

IV.

The court overlooked the effect of this decision and its resulting denial to the respondent of due process of law and its appellate rights guaranteed by the Fifth Amendment to the Constitution of the United States.

I.

The Decision of the Court Is Based Upon a Ground Not Specified nor Argued in the Petitions or Briefs on Certiorari.

This court granted *certiorari* on the theory expressed in the opinion that there was a conflict between the eighth and ninth circuits. The court, in its opinion, never comments on the conflict thereafter; nor does it decide that there was in fact no conflict. The effect of the decision, however, is not only to wipe out our rights in the ninth circuit but also to wipe out the rights of the litigant in *Gaynor v. Metal Reserves* (8th Cir.), 166 F. 2d 1011, and give rights to those opposite to that of a conflict, and to decide the case and give a remedy on grounds not advanced by petitioner nor answered by respondent, nor as provided by Congress.

In fact we have never had our day in this court on the issues now framed and decided by the court without notice or hearing of any kind.

Neither the petition for *certiorari* by the Government nor the brief in support thereof ever urged that all the opinions of the Circuit Court be vacated or that our rights of appeal on the merits be effaced. In the oral argument the court made no suggestion thereof. It was neither pre-

sented nor argued, nor did we ever have a hearing thereon.[1]

It has always been the rule of this court only to consider on *certiorari* the questions raised by the petition and the briefs and to afford both sides an opportunity to be heard. (Rule 38, Revised Rules of Supreme Court of the U. S.) The proceedings herein before this court as they now stand, gave neither side notice or an opportunity to be heard on the question of vacating the judgment of the Circuit Court on the merits and denying the right of appeal to the respondents and others similarly situated; nor on the alleged remedial procedure or proceedings now suggested by the court (particularly in the last paragraphs of the opinion on how petitioner may now proceed) without notice or hearing. This is contrary to Rule 38.

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[1](a) In the petition for *certiorari* the only question presented by the Government was as follows:

By the Joint Resolution of June 30, 1945 (c. 215, 59 Stat., 310), Congress provided for the dissolution, on July 1, 1945, of Defense Supplies Corporation and certain other government-owned corporations. It was provided, however, that no suit previously instituted by or against such corporations should abate by reason of their dissolution, but that, within twelve months thereafter, a court, on proper showing, might allow the suit to be maintained by or against their parent and successor corporation, Reconstruction Finance Corporation. The question is whether, in the absence of the substitution of Reconstruction Finance Corporation within twelve months of Defense Supplies Corporation's dissolution, a court is required to dismiss, as abated, a suit which had been instituted by Defense Supplies Corporation and fully tried before its dissolution, and to vacate, as void, a judgment rendered during that twelve months in favor of Defense Supplies Corporation.

(b) In its brief the solicitor-general said: "The question presented is whether in these circumstances the joint resolution required the judgment to be vacated and the action to be dismissed as abated where no substitution was made and the court was not advised of the statutory dissolution by any of the parties until more than thirty-one months after the event." Reference to the judgment was that of the District Court. (Petitioner's Brief, p. 3.)

Thus, important questions of law have been decided without notice or a hearing, to either litigant, which this court has repeatedly said and which the learned justice of this opinion has said, are the essence of due process of law, "traditional notions of fair play and substantial justice."

International Shoe Co. v. Washington, 326 U. S. 310, 316;

Milliken v. Meyer, 311 U. S. 457, 463;

Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565;

Gelfert v. National City Bank, 313 U. S. 221, 235 (due notice and opportunity to be heard).

In *White v. State of Texas*, 310 U. S. 530, 84 L. Ed. 1342, see footnote 310, U. S. page 520, this court granted a re-hearing where representatives of the State of Texas on their petition for re-hearing stated that they never had an opportunity to be heard on the questions raised.

In *Universal Oil Products v. Root Ref. Co.*, 328 U. S. 580, this court said:

"But obviously, a court cannot deprive a successful party of his judgment without a proper hearing.

"When an opportunity to be heard is denied altogether, the ensuing mandate of the court is void," etc.

Escoe v. Zerbst, 295 U. S. 490, 494, 79 L. Ed. 1566, 1567;

Sunal v. Large, 332 U. S. 174, 183.

There is no hearing or opportunity to be heard when the matter as decided has not been raised by one's adversary or the court or argued therein.

And Mr. Justice Murphy, author of this opinion, has in *Matter of Yamashita*, 327 U. S. 1, 79, 80, said, referring to the Fifth Amendment:

> "Not heretofore, has it been held that any human being is beyond its universally protecting spread in the guarantee of a fair trial in the most fundamental sense. That door is dangerous to open. I will have no part in opening it."—327 U. S. 79.

We assume this applies also to a corporation, and to proceedings in the Supreme Court and that a corporation, too, has the right to the universally protecting spread of fair notice and fair hearing on an issue fairly made and fully presented to the Supreme Court—elements of due process in its most fundamental sense.

Powell v. Alabama, 287 U. S. 52, 77 L. Ed. 162.

We had originally prepared the record in this case for *certiorari* to this court to test the validity of the trial court's judgment on the issue of negligence, and its failure in our view, to observe the applicable law of California relating to fires from negligence. The fire which occurred was one which took place at a skating rink sought out for and rented during the war at the instigation of the Government. A watchman employed by the Government had supervised and controlled the premises and the persons coming and going therefrom. Adequate fire fighting equipment was not available because of war restrictions on such materials which went to war zones and were solely within the control of the Government. The defendants did not cause the fire. We thought that under the applicable law of the State of California, that no negligence was shown against our client, whose sole alleged

liability were as warehousemen who had themselves exercised due care within the applicable standards of California. Contrary to California standards the trial court had in effect shifted the burden of proof regarding non-negligence to the defense, and we had prepared to test that issue in this Supreme Court when we discovered what Government counsel had concealed—namely the non-existence of the Defense Supplies Corporation, and filed our petition for the hearing in the court below.

To deprive the appellants of their right to test these matters, of whether there was negligence as a matter of law, on appeal, the same as any other litigant, by reason of the Act of Congress dissolving Defense Supplies and the concealment and non-disclosure of those facts by Government representatives fully aware of the matter, at all times, from both the court and opposing counsel and the corporations as private litigants, we submit is neither law nor justice, nor required in a fair construction of the statute herein.

The decision of the court, in effect, without hearing on that point, permits the Reconstruction Finance Corporation to destroy the right of the defendants to appeal and to a decision on the merits by the failure of the R. F. C. to perform the functions it was instructed to perform in the statute by Congress. By failing or refusing to carry out the Congressional mandate to apply for substitution, according to the terms, this court has granted what Congress never intended or expressed, to the Reconstruction

Finance Corporation, namely the power to withhold from these defendants their right of appeal on the merits. Thus this court has placed into the statute two provisos never intended by Congress. If there are others similarly situated, as was suggested as a possibility in the oral argument, they will likewise be affected.

We ask for re-hearing of the decision as we think that the court should vacate its own decision on questions not raised or presented by the writ of *certiorari* (Rule 38). (*White v. Texas, supra; Flourney v. Wiener, supra.*) We should be granted a HEARING on matters not argued or presented by that writ, so that we may brief and argue them.

Rule 38 of the Rules of this court provides:

> "The petition (*certiorari*) shall contain a summary and short statement of the matter involved; * * * the questions presented; and the reasons relied on for the allowance of the writ. *Only the questions specifically brought forward by the petition for writ of certiorari will be considered* * * *."

The decision of the court is now contrary to the court's own rules, which have the force of law.

This court was without jurisdiction of the matters therein considered and determined. (See *Flournoy v. Wiener*, 321 U. S. 253, 88 L. Ed. 708.)[2]

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[2] "But since he failed to raise or brief in this Court any question as to the validity of the Louisiana statute under the Fourteenth Amendment, we have no jurisdiction of the case either on certiorari or on appeal. * * *"

Flournoy v. Wiener, 321 U. S. 253, 263.

II.

The Court Erred in Its Statement of the Applicable Law in the Case. The Court Should Have Dismissed the Writ for Want of Jurisdiction.

Lack of Jurisdiction.

In the decision of this Honorable Court it has conceded that this court has no jurisdiction to consider the merits of the case. This court has said it is without jurisdiction on the merits. Being without jurisdiction on the merits, it is without jurisdiction *at all* and should dismiss the writ as improperly granted. Therefore, if this court has no jurisdiction to consider the merits of the case, who were the petitioners before this court? The Defense Supplies Corporation was dissolved by Congress and had no existence; the Reconstruction Finance Corporation was never permitted to be substituted. The Reconstruction Finance Corporation never petitioned this court for leave to appear as a party. Where was this court's jurisdiction to entertain the petition? Therefore, how could this court lawfully entertain the proceedings without any parties petitioners or plaintiff actually existing? And does this court's "supervisory" jurisdiction permit it to act on a case without an adversary party having some legal authority to appear? Without issues presented by either side and without motion to appear? Mere because they have filed papers in this court?

Congressional Mandate.

But passing on to the next phase of the issue, this court concedes in its opinion that as of July 1, 1945, "the first section dissolved several government corporations including Defense Supplies, and transfers all their assets and authority to the Reconstruction Finance Corporation."

The Act of Congress reads:

> "That, notwithstanding any other provision of law, all functions, powers, duties, and authority of the corporations hereinafter designated, are hereby transferred, together with all their documents, books of accounts, record, assets, and liabilities of every kind and nature, to Reconstruction Finance Corporation and shall be performed, exercised, and administered by that Corporation in the same manner and to the same extent and effect as if originally vested in Reconstruction Finance Corporation, and the designated corporations are hereby dissolved:" (Emphasis ours.)

Therefore, it is clear that from and after July 1, 1945, the Defense Supplies Corporation was without any or ALL functions, powers, duties and authorities and was without documents, books of accounts, records, *assets* or liabilities of any or every kind or nature; and, further, that the Reconstruction Finance Corporation was directed to perform, exercise and administer the functions, powers, duties and authorities of the Defense Supplies Corporation "as if originally vested in Reconstruction Finance Corporation."

If it is possible for the English language to make anything clear, the controlling statute here made clear that contrary to the court's statement the Defense Supplies Corporation did not have "enough life left to litigate its action" and that Congress never intended it to have.

This court has conceded, what must be apparent, that a chose in action, a cause of action, a right to a lawsuit, a

right to a judgment, is certainly an asset such as is described in the controlling statute. (50 C. J. 748, sections 8 and 9.)

Defense Supplies Corporation did not need to "have enough life remaining to litigate its actions" because its actions were transferred by the Act of Congress to the Reconstruction Finance Corporation. Therefore, when Congress transferred all the assets including this asset, it left no life in Defense Supplies Corporation, not even for litigating purposes, as none were necessary.

CONGRESSIONAL HISTORY.

Our interpretation of the joint resolution and the effect thereof, as above set forth, namely,

> that all of the assets and even the authority of the Defense Supplies Corporation was transferred to the Reconstruction Finance Corporation,

is in accord with the Congressional history of the act and contrary to the court's holding herein.

As originally proposed in Congress, the joint resolution consists in its entirety of what is now section 1, and contained no reference whatever to survival of action or substitution. (*Id.* at p. 1, Hearings before Senate Committee on Banking and Currency on S. J. Res. 65, 79th Cong., 1st Sess., p. 2.)

The purposes for which the corporations previously set out in the joint resolution had been accomplished, and it was stated in the Congress that "the transfer to the Reconstruction Finance Corporation of the functions, powers,

duties, and authority of these corporations would simplify operations and it may reasonably be expected that some economy in operation can be effected."

> "The original language was intended and was apparently considered sufficient, to make RFC responsible for all liabilities and contracts of the dissolved corporations." (*Id.* at pp. 10-11.)

While no specific mention was made of assets in court proceedings, the language of section 1 provides for administration by RFC "in the same manner and to the same extent and effect as if originally vested in Reconstruction Finance Corporation." This clearly indicates that Congress had transferred the cause of action to RFC.

Section 2, which added the provisions as to a duty to appear in court and show a necessity for continuation of the action, was designed apparently with the intent of creating a right and a duty upon RFC to follow the procedure therein set forth (else as now this court suggests the words are meaningless) and also to give right and duty to other litigants or creditors in enforcing rights against RFC, if they acted within the year. It was a two-way street with the rules of the road the same for all users thereof, whether government or private.

In the hearings in Congress Senator Taft said: "In regard to the legal implications of this bill—whether there should be a specific statement that R.F.C. shall become responsible for the liabilities and contracts of these corporations," and "whether it might not be desirable, in order that contractors might not be in doubt, to have the

express statement that all liabilties and *contracts* of these corporations shall be passed on to R.F.C. and that *R.F.C.* shall become responsible for them." (Emphasis ours.) (*Id.* at pp. 10-11.) John W. Snyder, Federal Loan Administrator, testified for the RFC that "that was the intention." Senator Taft then suggested a clarifying amendment to be drafted by *RFC* general counsel, and it was this measure that became section 2. (91 Cong. Rec. 4782, 5628; S. Rep. No. 285, 79th Cong., 1st Sess.) The measure was passed by the Senate without discussion. (91 Cong. Rec. 5628.)

It thus is apparent that Congress intended that everything should pass to the RFC at the time of the resolution and that RFC was from that time on, both by the requirements of Congress, should have all assets and that nothing was left in the possession DSC (even the right to continue to litigate) for that right was unnecessary since RFC had that right transferred to it.

"A chose in action is property." (See 14 C. J. S., p. 1114, under the definition of "chose in action" and 15 C. J. S., pp. 763-764, defining "chose in action." See also 50 C. J. 738, secs. 8 and 9.)

That Congress had transferred these "chose in action" to the Reconstruction Finance Corporation by its joint resolution is clear not only from the language of the section but from the history of the Congressional action. Therefore, this court was in error and added language to the statute in holding that Defense Supplies Corporation "continued on for a litigating purpose" for there was nothing left for it to litigate and the rights had been transferred.

III.

RFC, Not DSC, Had Twelve Months to Continue the Action if It Chose.

The purpose in preventing the action from abating thereafter for 12 months was therefore to let *Reconstruction Finance Corporation* continue with the action, not to let the defunct *Defense Supplies* continue with the action. And Reconstruction Finance Corporation could maintain the action upon making the showing as set out by Congress in section 2 of the Act. We did not maintain, and do not maintain now, that the cause of action was not transferred to Reconstruction Finance Corporation as of July 1, 1945. What we did maintain, and what we do maintain, is that the particular action *in the name of Defense Supplies Corporation* was transferred to Reconstruction Finance Corporation for its action in whatever way it saw fit if it complies with the mandate of Congress with court consent. Many reasons might have dictated it not to wish to maintain the action further. To give it this construction, we submit, is to give it the construction which Congress intended it to have, rather than add the proviso to permit the dead corporation to continue "with life for litigating purposes" which Congress did not permit it to have. Also to permit Reconstruction Finance Corporation to have the cause of action would have permitted that corporation to proceed if it desired on its cause of action and to enable the defendants who do not carry the burden of proof or of maintaining the action to meet the cause of action, and to have the right of appeal on the merits which due process of law permits the appellant to have. We submit that Congress did not intend to strip the respondents herein, or anyone, of any former rights, including the right to appeal or the right to test the validity of the judgment below in the Court of Appeals, or in this

court. **The construction which this court has now placed upon the Act of Congress deprives us of both, and permits the trial court to enter a judgment in favor of a dead corporation who at the time of the entry of the judgment, had not only ceased to exist, but had transferred all of its assets and authority to the Reconstruction Finance Corporation. What could be left to enter judgment on, therefore, we submit, is not clear, since Congress has stripped all authority from Defense Supplies Corporation, and by the same token has stripped the trial court of all authority to enter judgment for such deceased corporation, and has already transferred the chose in action to RFC.**

We agree with this court that the statute categorically says that no action shall abate, but that the statute also has already transferred, by reason of the statutory authority, all of the assets and authority to the Reconstruction Finance Corporation. Therefore, the statute must be read in its entirety as stating that no action possessed by or on behalf of the Reconstruction Finance Corporation shall abate provided that within twelve months it makes the necessary showing. It did not say that no action shall abate as far as the Defense Supplies Corporation was concerned, as it had taken all of its assets and even its name, and dissolved it completely. Such a proviso was unnecessary as far as DSC was concerned, since it then had nothing to abate. It owned no action any longer. It in fact had nothing—not even a name.

The words "no action shall abate" cannot be stripped from the other portion of the statute which has transferred that action to the Reconstruction Finance Corporation and provided, as this court has said, for a certain mode and means of Reconstruction Finance Corporation asserting its desires and its authority.

The other section of the statute was passed providing for certain other conditions for Reconstruction Finance Corporation, or anyone else, to show a necessity for a survival of the action. That is, that there must be a petition to the court showing a necessity for the survival and a court must approve of the showing. Congress used these words intentionally.

This court as it has now construed the statute, has made these words meaningless because it has held:

(a) That even though Congress transferred the asset, to-wit, the lawsuit, to Reconstruction Finance Corporation, it really hadn't transferred the asset to Reconstruction Finance Corporation, and Defense Supplies still possessed it.

(b) That although the statute required the Reconstruction Finance Corporation to make a showing in court and receive judicial approval for necessity of survival of the action within twelve months and receive judicial approval, that it is not necessary to show a survival of the action was necessary or to receive judicial approval, and

(c) That even though none of the Congressional mandates are observed that the trial court can enter judgment in favor of a dead corporation that has no name, that has no assets, that has no right and no authority, and without the judicial showing and approval that Congress said was necessary in the event such a transfer was made. And it says further (this never being discussed or argued in this court) that Reconstruction Finance Corporation may now sue by a special proceeding to enforce a judgment entered in favor of a dead corporation, who had no assets and no

authority at the time of the entry of the judgment. We submit that this is contrary to the law and the facts, and is judicial legislation in its broadest sense.

The court has accomplished the extraordinary result by the use of the following language:

> "If Reconstruction Finance is not substituted within one year, the action by or against Defense Supplies is, of course, at an end and the parties are left in *status quo*."

This portion of the sentence apparently means that unless the Reconstruction Finance Corporation is substituted the parties were relegated to such rights as they had before the litigation was commenced. Assuming that that is what the court's language means, the court then proceeded to state:

> "But there is nothing to show that during the year in which Reconstruction Finance may be substituted, action by or against Defense Supplies cannot continue in Defense Supplies' name."

If the second portion of the sentence means what it says, then the first portion of the sentence is meaningless. If the action can continue without RFC, then obviously the parties are not left in *status quo*. Also, it is perfectly clear that the sentences do not state the facts. There is certainly nothing in the statute that says the action may be continued in Defense Supplies' name. Defense Supplies, after July 1, 1945, had no name. There was no longer a legal entity, in name or in any other capacity. It had lost its asset—the chose in action the lawsuit, by transfer.

The court then proceeded to state:

> "If Congress states that no action shall abate, we fail to see why we should make additional language a proviso."

If this sentence has any meaning, it is apparently intended to mean that the court does not feel it should add a proviso to the Congressional mandate. With that proposition we are in accord. But, if the court intends the statement as a statement of fact, it is erroneous as Congress already added the proviso, and did not leave it to the court to make the addition. The addition in the statute of Congress after the reference to the "abatement" begins with the word "*but*" which is clearly not used in the conjunctive but is used in the more common sense of a proviso—an "objection," "restriction" or "exception." (See Webster's Unabridged Dictionary, definition of the word "but.") Then follows this statement:

> "And since the District Court entered its judgment during the year allowed for substitution of the RFC, we conclude it was valid when entered."

There certainly is nothing in the preceding sentence which would justify any such conclusion. The court merely states that notwithstanding the complete dissolution of Defense Supplies and the fact that the Congressional mandate did not permit Defense Supplies to litigate after its death, nevertheless in the teeth of the statute a valid judgment could be entered in its name after the dissolution. No authority, statutory or otherwise, is cited for this extraordinary conclusion. As none could be.

A decision involving $42,000 is small and inconsequential, in the vast scheme of things, but the principles herein

involved are important. The measure of power is the statute and the mode and manner it provides. Salutary upon government corporations and their officers is the fact that they, too, must comply with the statute to assert the rights they claim. (*Cudahy Packing Co. v. Holland*, 315 U. S. 357), and that this court measures all power and jurisdiction by the express words of Congress, which can grant or withdraw jurisdiction even from courts.

IV.

The Court Erred in Its Statement of the Facts in the Case. The Decision Is Contrary to the Facts.

The court also says, in supporting its position, that the judgment was not robbed of its vitality by the abatement of appellate proceedings. The latter conclusion adheres "to the familiar rule that a judgment against or in favor of a corporation is not erased by subsequent dissolution." This has only been a rule of state law, not of federal law, where the courts are bound under the Seventh Amendment by the common law. At common law an action abates with the dissolution of a corporation.

Here the dissolution was prior to the entry of any judgment, not *subsequent* to any entry of judgment, hence this court erred in its statement of the fact and position herein.

Furthermore, this court says that respondents are not in a position to object that they did not perfect an appeal, because the Court of Appeals had no jurisdiction when respondents could have remedied the defect by a motion to substitute the Reconstruction Finance Corporation. Con-

gress did not place this burden on us, but upon the party seeking to maintain his suit or judgment.

It has always been held that the plaintiff in an action has the burden of maintaining his suit throughout all of the proceedings. This holding is now changed by this Honorable Court.

Furthermore, we have a peculiar situation in the present case wherein Government counsel were aware from the start of the dissolution of its corporation (see opinion of Ninth Circuit Court before whom governmental counsel made the admission, yet they proceeded in entire silence throughout the appellate proceedings in the trial court, and throughout the appellate proceedings without any disclosure to court or counsel of the situation in which they no longer represented a corporation or had an asset in it. Was this not fraudulent concealment from the court? If the rule now set out by this court in this case is to stand, it means that every time a Government corporation has a suit against a private litigant that it becomes incumbent upon the private litigant not in touch with the Government office or every issue of the Congressional Record to check up and see if the corporation, doing business as private persons, is still in existence or if Congress has dissolved it. Certainly this should not be the burden of the defendant or the party doing business with the Government. Such a holding is highly unfair to litigants in a private capacity doing business with the Government. Certainly Government officers are, and should be, charged with the duty of prompt disclosure and to be required to

take all of the necessary steps to protect not only themselves, but the litigants on the other side. In a measure Government officers and attorneys at law, like United States attorneys, represent not only themselves but all of the people. They are not merely the spokesmen of the litigating Government corporation, they are the representatives of the people who pay their taxes and with whom they are doing business. Speaking of United States attorneys this court has said:

> "'The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor —indeed, he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones.' Berger v. United States, 295 U. S. 78, 88, 79 L. Ed. 1314, 1321, 55 S. Ct. 629. Compare New York C. R. Co. v. Johnson, 279 U. S. 310, 316-318, 73 L. Ed. 706, 710, 49 S. Ct. 300."

Viereck v. U. S., 318 U. S. 248, 87 L. Ed. 741.

We think the same applies to any Government attorney and that he has the duty to disclose—not to conceal—matters which would affect the substantial rights of the parties and to protect even the opposing litigant and Appellate Court in any change of corporate structure. Fur-

thermore, litigants have a right to presume that official duty is being regularly performed, and that Government counsel would not permit either court or counsel to conduct a trial or appeal in which there was no longer a party plaintiff and over which the Appellate Court had no jurisdiction, and which would be a waste of the taxpayer's money.

The Temple of Justice should not be defiled by improvidently assumed jurisdiction for any purpose whatsoever.

This court, the greater teacher, should protect the purity of all courts. Governmental misconduct, by any of its officers or agents, should be as severely dealt with as an illegally gotten confession by a police officer (*Chambers v. Florida*, 309 U. S. 227) or appeals to passion (*Viereck v. U. S.*, 318 U. S. 348). A judgment, so gotten or maintained, should be stricken for want of jurisdiction and due process, which dictates that the procedure likewise be fair. (Justice Roberts in *Snyder v. Massachusetts*, 291 U. S. 97, 78 L. Ed. 674.)

And see:

Sorrells v. U. S., 287 U. S. 457, 77 L. Ed. 425

Olmstead v. U. S., 277 U. S. 438, 483, 485

"The protection of its own functions and the preservation of the purity of its own Temple belongs only to the court."

Sorrells v. U. S., 287 U. S. 457.

V.

The Court Overlooked the Effect of This Decision and Its Resulting Denial to the Respondent of Due Process of Law and Its Appellate Rights Guaranteed by the Fifth Amendment to the Constitution of the United States.

The holding of this court, which would deprive these respondents of their right to test the validity of the original judgments on appeal, certainly would be a violation of due process of law guaranteed by the Fifth Amendment to the Constitution of the United States. (See *Woods v. Hills*, No. 437, October Term 1947; 16 Law Weekly 4446, 4447; also *Yakus v. United States*, 321 U. S. 414.)

THE DECISION OF FIX V. PHILADELPHIA BARGE CO.

This court has also overlooked the effect and language of, or over-ruled, *Fix v. Philadelphia Barge Co.*, 290 U. S. 532, 78 L. Ed. 483 (1934). There the court held that the failure to comply with the statute foreclosed the particular remedy, but not the cause of action.

In *Fix v. Philadelphia Barge Co.*, 290 U. S. 532, 78 L. Ed. 483, which this court decided in January, 1934, the court held that section 11 of the Act of 1925 is an extension of the Act of February 8, 1899. That case distinguishes a clear difference between the action and the cause of action. Revival of the action is necessary because that does not survive the death or the resignation of the officer in the action, but the *cause* of action may survive depending upon its nature in the applicable rule.

We urge this court, therefore, to hold that Reconstruction Finance Corporation had assigned to it by a joint resolution of January 30, 1945, the cause of action; that that cause of action survived, even though the particular action which had not then been completed died. When the mandate of Congress had not been complied with by R. F. C., such a holding would be in accordance with the clear intent of Congress to give R. F. C. that "*chose* in action" and permit R. F. C. to proceed in accordance with that transfer. Such a holding would not deprive respondent of its right to litigate or appeal from any action taken by R. F. C. and it would do law and justice in the case and comply with Congressional mandates. A contrary holding results in giving a judgment to a dead and defunct corporation not maintained by Congress for any purposes and deprives us of our day in the trial and appellate courts on the merits and on any defenses we may have.

We conclude, therefore, that this court was without jurisdiction of the subject matter decided by the decision, for it was neither raised nor presented on the petition for *certiorari*, nor in the oral argument; that the decision, without notice or without hearing, offends the basic fundamental rights of the respondents here to notice and due process of law; that it deprives the respondents herein of a hearing on the subject matter decided and of their constitutional rights of appeal without a hearing on that subject; that the decision is contrary to the specific Act of

Congress involved, and the plain language thereof, as well as the Congressional intent in passing the Act.

This court has never been afraid to grant a re-hearing where it has been shown to have been mistaken in its decision, and even to have granted a second re-hearing where it had overlooked or failed to consider fundamental rights involved in a case which had not theretofore been fully or properly considered by this court, and right the error.

Zap v. U. S., 326 U. S. 802, 90 L. Ed. 488.

It has always been the law that the person seeking to maintain litigation must maintain it throughout.

If this court has improperly granted the writ it will dismiss for want of jurisdiction. *Superior Court v. Lillefloren*, No. 191, October 1948 term.

We submit and pray that a re-hearing should be granted and this court's judgment vacated and set aside.

Respectfully submitted,

LAWRENCE WAREHOUSE CO. and
CAPITOL CHEVROLET CO.,

By MORRIS LAVINE and
WILLIAMSON AND WALLACE,
Attorneys.

Certificate of Counsel.

I, MORRIS LAVINE, one of counsel for Respondents herein, certifies that the foregoing petition is presented in good faith and not for delay, and that the petition is confined to intervening circumstances of substance and controlling effect which have arisen by reason of the opinion of the Supreme Court of the United States rendered on April 18, 1949, and that the petition for re-hearing is restricted to the grounds arising by reason of the said opinion and matters therein set forth.

MORRIS LAVINE,
Attorney for Respondents.